IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. AND HERBERT N. SOMEKH, *Petitioners*

v.

LEO M. SHORE, *Respondent*

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
JOEL D. JOSEPH
1712 Eye Street, N.W.
Suite 210
Washington, D.C. 20006
(202) 857-0240

Attorneys for Amicus Curiae
WASHINGTON LEGAL FOUNDATION

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Consent to the filing of the brief has been withheld by counsel for Leo M. Shore.

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 15,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of businesses and to ensure that the civil liberties of businesses are strengthened and preserved.

Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. None has as its primary concern the issue of the businessman's right to a jury trial. WLF's sole concern in this case is the preservation of the right to a trial by jury and the prevention of the collateral estoppel of that right by a federal agency proceeding.

The growth of the number and magnitude of government agencies is eroding the right to a jury trial in this nation. WLF is seeking to control the unbridled discretion, growth and proliferation of bureaucracy and to preserve the right of citizens and businesses to a jury trial when they are faced with allegations of wrongdoing by government agencies.

Accordingly, Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

DANIEL J. POPEO
JOEL D. JOSEPH
1712 Eye Street, N.W.
Washington, D.C. 20006
(202) 857-0240

Attorneys for WASHINGTON LEGAL FOUNDATION

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INTERESTS OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION, INC.

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ARGUMENT

I. BUSINESSMEN HAVE A CONSTITUTIONAL RIGHT TO A JURY TRIAL IN A CIVIL ACTION BROUGHT UNDER THE FEDERAL SECURITIES LAWS.

Had there been no prior injunctive decision in the courts below petitioners would unquestionably have had a right to a jury trial. *Shore* v. *Parklane Hosiery Company, Inc.*, 565 F. 2d 815, 824 (2d Cir. 1977); *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied* 403 U.S. 904 (1971).

The Seventh Amendment to the Constitution provides:

> In suits a common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, an no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

To be entitled to a jury trial under this Amendment the suit must be one at common law or in the nature of such a suit. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

Although this case is not one at common law it is in the *nature* of an action at common law. The action below could properly be characterized as one in the nature of assumpsit, a form of action at common law. F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (CAMBRIDGE UNIVERSITY PRESS ED. 1968) 56. Maitland identifies assumpsit as a claim for deceit based on the active misconduct of defendant. The allegations in the court below are closely analagous to an action based on deceit and to the allegedly active misconduct of defendant. Concerning a civil suit brought under the Securities and Exchange Act the Supreme Court stated:

> "The injury which a stockholder suffers from corporate action pursuant to a *deceptive* proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the *deceit* practiced on him alone but rather from the *deceit* practiced on the stockholders as a group."
>
> *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964) (emphasis added).

The factual situation in the *Borak* case, concerning the cause of action, is virtually identical to the instant case. Both cases involved an allegedly misleading proxy statement concerning a proposed merger. Assumpsit,

or deceit, clearly forms the basis for these actions, which is in the nature of an action at common law.

Any doubt as to the availability of a jury trial is to be resolved in favor of that right, as Mr. Justice Black emphasized:

> [T]he right to a jury trial is a constitutional one, however, while no similar requirement protects trials by the court . . . .
>
> *Beacon Theatres* v. *Westover,* 359 U.S. 500, 510 (1959)

Therefore, had there been no prior determination by a Court sitting in equity, doubts about the availability of a jury trial would be resolved in defendants' favor and defendants would have been entitled to a jury trial. Amicus now turns to the question of whether the doctrine of collateral estoppel can override the constitutional requirement of a trial by jury.

II. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL TAKES PRECEDENCE OVER APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL.

The doctrine of collateral estoppel is not found in the four corners of the Constitution of the United States. The Court below held that the doctrine of collateral estoppel should be applied to further the interests of "fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results" and the achievement of just, speedy and inexpensive determinations of civil actions. 565 F.2d at 821. None of these interests is protected by the Constitution of the United States. "Economy", "finality" and "inexpensive" are descriptions of expediency which should never be permitted to infringe fundamental constitutional rights.

Amicus suggests that in the interests of "fairness" the doctrine of collateral estoppel should *not* be applied. The reasoning behind the doctrine of mutuality of estoppel should be considered as a basis for *preserving* the constitutional right to a trial by jury.

A. Mutuality of Estoppel.

Although the trend appears to be away from that of applying the doctrine of mutuality of estoppel in general,[1] as it applies to the right to a jury trial the doctrine merits thorough consideration. As applied to the facts of this case mutuality would not exist because Mr. Shore was not a party to the SEC injunction action. Since Mr. Shore was the plaintiff he could exercise significant control over the progress of the case in which he was a party. He could delay the case by discovery or other means for the purpose of allowing the SEC injunction action to be decided or tried first. By doing so Mr. Shore would have the best of both worlds. If the SEC prevailed in their case he could use the doctrine of collateral estoppel to prevail in his case. If the SEC lost Mr. Shore would not be bound by the doctrine since he was not a party in the first case.

Similarly, a potential plaintiff could closely monitor a federal agency's injunction action against a business. If the government prevailed the business would be easy pray to an action based on the theory of collateral estoppel.

One of the reasons behind the theory of mutuality of estoppel is obviously that all parties should have been involved in the earlier proceeding in order to be bound

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[1] See *Rachal* v. *Hill, supra,* 435 F.2d at 61, 62.

or advantaged by the later proceeding. There is a fundamental unfairness in allowing a potential litigant to sit on the sidelines while a government agency puts its great weight against a private business.

In any equitable action, when the federal government is on one side and a private company, businessman, or individual on the other, the balance of equities often tips toward the federal government. The reasons for this is two-fold:

1). The federal government is supposedly representing the broad public interest, where the private litigant is supposedly not;

2). The federal government usually has more resources to bring into action in the judicial battlefield than private litigants.

These factors should have no bearing on a later-decided civil action between two private parties. Fundamental fairness dictates that both parties be given equal opportunity to have their day in court.

The effect of the decision below is to unfairly place defendants, who were parties to both an SEC injunction action and a private action based on the same alleged violations of law, in an untenable position if defendants desire to preserve their right to a jury trial. *See* Brodsky, *The Frustration of Private Counsel: Uncertainties Favor the Commission,* 178 (116) N.Y.L.J. 48 (1977); Mathews and Thompson, *SEC Enforcement Program: Emphasis on Prerequisites Highlights Year's Actions,* 178 (116) N.Y.L.J. 45, 46 (1977). While this case arises in the context of an SEC action the same problems develop in the context of other agency actions. See subsection B, *infra.*

Delay in an SEC enforcement action "to safeguard the public interest" is not tolerated. *Securities and Exchange Commission* v. *Wills,* [Current Transfer Binder] CCH Fed. Sec.L.Rep. ¶ 96,321 (D.D.C. 1978). Therefore, a defendant in an SEC action cannot stay that action to enable a related private action to be tried first. Consequently, the defendant faced with an SEC action and a related private action for damages is left with two "choices", either of which would create injustice concerning the constitutional right to a jury trial.

The first "choice" is to contest the SEC action. However, by doing so, according to the Court below, the defendant exposes himself to the risk of an adverse determination which would extinguish his constitutional jury trial right in the private action.

The other choice is to settle the SEC action to avoid a trial and thereby prevent the possibility of an adverse determination. However, to force a defendant to settle one action, in which it has no jury trial right, in order to preserve its constitutional jury trial right in a second action, would be inconsistent with the Seventh Amendment's preservation of that right. Moreover, to place a defendant in such a position is to give the SEC, at a time when its allegations are as yet unproven, unfair and unwarranted leverge in dictating settlement terms to a defendant intent on preserving its jury trial right.

In this regard, the Brodsky article, *supra,* after discussing various areas of uncertainty in SEC litigation, stated:

> "Thus, in SEC injunction actions the Commission is now armed with an additional argument in

its powerful array of arguments to persuade targets of investigations to settle with them—namely, that even if no injunction is mandated, the court may issue findings and direct that public disclosure material be corrected. If it does, those findings will be binding, at least in the Second Circuit, in a private action for damages." Brodsky, *supra,* at 48.

Similarly, the Mathews and Thompson article, *supra,* observed:

> "*Shore* on its face is a great boon for class action plaintiffs—at least those who are able to bring their cases in the Second Circuit. The decision may also benefit the SEC's enforcement program. Potential SEC defendants are less likely to resist settlement and to force the SEC to trial knowing that the strike suitors wanting in the wings will be able to ride the coattails of the SEC's substantial trial preparation and presentation efforts." Mathews and Thompson, *supra,* at 46.

In summary, the decision below places defendants in private actions under the federal securities laws in a positions which either does violence to their Seventh Amendment jury trial right or may force them to refrain from contesting allegations they deny in related SEC enforcement actions.

B. The Trend Toward Eliminating Jury Trials Should Be Reversed.

If an administrative agency can seek injunctive relief against a private business and destroy the business's right to a jury trial in a subsequent proceeding, will the result be the same when an administrative or regulatory agency itself makes a finding of fact and there is a subsequent legal proceeding against the company?

New administrative agencies and new agency functions are spawned by Congress nearly every year.[2] The growth of these agencies and of their functions could effectively swallow the right to a jury trial, either by injunction proceedings, as in this case, or by administrative determinations of factual disputes.

The Seventh Amendment to the Constitution did not mention the role that administrative agencies, unknown at common law, would play in destroying the right to a jury trial. But the issue before the Court is whether a prior agency injunction proceeding determination of a question of fact precludes a party from entitlement to a jury trial determination of that same question of fact. Amicus contends that it can not and should not.

Administrative agencies are dominant in our society and are continuing to grow in number and in magnitude. More than twenty-five years ago Justice Jackson stated :

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affect-

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[2] Environmental Protection Agency, 84 Stat. 2086, 35 Fed. Reg. 15623 (1970); Occupational Safety and Health Administration, Pub. L. 91-596, 84 Stat. 1590, 29 U.S.C. Section 651 *et seq.* (1970); Consumer Product Safety Commission, Pub. L. 92-573, 86 Stat. 1207, 15 U.S.C. Section 2053 (1972); Commodity Futures Trading Commission, Pub. L. 93-463, 88 Stat. 1389, 7 U.S.C. Section 4a (1974); Employee Retirement Income Security Act, Pub. L. 93-406, 88 Stat. 829, 29 U.S.C. Sections 1001, *et seq.* (1974); Magnuson-Moss Warranty-FTC Improvement Act, Pub. L. 93-637, 88 Stat. 2186, 15 U.S.C. Sections 45 *et seq.* (1975); Mine Safety Health Administration, Pub. L. 95-164, 91 Stat. 1290, 30 U.S.C. Sections 801, *et seq.* (1977); Mining Control and Reclamation Act, Pub. L. 95-87, 91 Stat. 447, 30 U.S.C. Sections 1201, *et seq.* (1977).

ed by their decisions than by those of all the courts . . . .

> *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 487 (1952).

Justice Frankfurter wrote five years later that review of administrative agencies constituted the largest category of the Supreme Court's work, comprising one-third of the total cases decided on the merits. Frankfurter, *The Supreme Court in the Mirror of Justices,* 105 U.Pa. L.Rev. 781, 793 (1957).

In recent years many new agencies have been created and no major agencies have been eliminated.[3] If each federal administrative agency can make factual determinations which are binding on later court proceedings then the right to trial by jury will become a vestige of history. Although administrative agencies may be efficient in determining questions of act in large numbers of cases,[4] the right to a jury trial is too fundamental in our Constitutional framework to give way to mere "efficiency" or expediency.

Federal administrative agencies have been handling more than ten times the number of cases as the federal district courts. For example, in the year ending June 30, 1963 there were 7,095 trials in federal district courts and 81,469 cases disposed of by the federal administrative agencies after oral hearing.[5] Based on the proliferation of new agencies during the last fifteen years Amicus believes that the number of cases decided by

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[3] See n.2, *supra.*

[4] Amicus vigorously disputes the contention that federal agencies are efficient in this regard.

[5] K. Davis, ADMINISTRATIVE LAW TEXT, 3D ED. 4 (1972).

the federal bureaucracy has increased more rapidly than the federal caseload. In any event the trend toward the increasing power and authority of the federal administrative agencies is undeniable.

The Supreme Court has held that there is no constitutional right to a jury trial in a hearing before an administrative agency. *See, e.g. Atlas Roofing Co. Inc.* v. *Occupational Safety and Health Review Commission,* —— U.S. ——, 97 S.Ct. 1261 (1977); *Phillips* v. *Commissioner,* 283 U.S. 589 (1930); *Crowell* v. *Benson,* 285 U.S. 22 (1932); *National Labor Relations Board* v. *Jones & Laughlin, supra.* The courts have also held that there is no right to a jury trial in a purely equitable action. *Damsky* v. *Zavatt,* 289 F.2d 46 (2d Cir. 1961).

In mixed cases of law and equity, however, the Supreme Court has always preserved the right to a jury trial on those questions of fact common to both categories of cases. *Beacon Theatres* v. *Westover, supra; Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962).

If both the SEC injunction case and this case had been consolidated for trial under *Beacon Theatres* and *Dairy Queen* there is no doubt that a jury could have decided the common questions of fact.

The mere fact that the SEC case was not consolidated should not deprive Parklane and Mr. Somekh of their constitutional right to a jury trial. Similarly, that the SEC case was decided first[6] should not control the question of the right to a jury trial. The race to the

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[6] However, the private action in this case was *filed* first. *See* 565 F.2d at 817.

courthouse or through the courthouse should not determine whether a constitutional right is preserved or destroyed.

More and more decisions which would formerly have been decided by juries are now being made by administrative agencies. This Court, and this Court alone, can reverse this dangerous trend by preserving the time-honored constitutional right to a jury trial in this case from destruction by an administrative injunction action.

III. CONCLUSION

A jury trial is guaranteed by the Seventh Amendment to the Constitution of the United States, whereas a trial to the court and collateral estoppel are not so guaranteed.

The right to a trial by jury is being eroded by injunctive proceedings and fact determinations of the burgeoning federal administrative bureaucracy. Collateral estoppel as a result of agency-sought injunctions is another example of the trend toward short-circuiting the jury trial right. This court must hold the line and reverse the trend toward extinction of the constitutional right to a trial by jury.

Respectfully submitted,

DANIEL J. POPEO
JOEL D. JOSEPH
1712 Eye Street, N.W.
Washington, D.C. 20006
(202) 857-0240

Attorneys for Amicus Curiae
WASHINGTON LEGAL FOUNDATION, INC.